FILE COPY

Office Supreme Court, U.S.
FILED
OCT
JAMES R. BR[illegible], Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 452

FERNANDO S. FORFARI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
Attorney for Petitioner.

ERNEST E. EMMONS, JR.,
THOMAS A. MULVIHILL,
1095 Market Street,
San Francisco 3, California,
Of Counsel.

[illegible] SAN FRANCISCO

Subject Index

	Page
Opinions of lower courts	2
Jurisdiction statement	2
Questions presented for review	2
Statutes involved	3
Statement of case	5
Jurisdiction of lower courts	7
Reasons for granting writ of certiorari	7
(1) Conflict among Circuits	8
(2)-(3) Remedy of workmen's compensation not only remedy	9
Conclusion	16
Appendix "A"—Opinion of United States District Court, August 2, 1957	i
Appendix "B"—Opinion of United States District Court, December 31, 1952	iv
Appendix "C"—Opinion of United States Court of Appeals	vi
Appendix "D"—Judgment of United States Court of Appeals	xviii
Appendix "E"—Statutes	xix

Table of Authorities Cited

Cases

Pages

Aubrey v. U. S., 254 F. 2d 768 ..... 8, 13, 14

Cohens v. Virginia, 19 U.S. 264 9

Daniels v. Chanute Air Force Base Exchange (D.C.E.D. Ill. 1955) 127 F.S. 920 8

Faleni v. U. S. (D.C.E.D. N.Y. 1949) 125 F.S. 630 8

Johansen v. U. S., 343 U.S. 427 ..... 7, 8, 9, 10, 12, 13, 14

Smith v. Davis, 323 U.S. 111 9

Standard Oil Co. v. Johnson, 316 U.S. 481 ..... 7, 9

U. S. v. Allegheny County, 322 U.S. 174 9

U. S. v. Detroit, 355 U.S. 466 9

Statutes

California Insurance Code, Sections 11770, 11774, 11778, 11779 4

California Labor Code:

Sections 3201-6149 3

Section 3852 ..... 3, 4, 12, 13

Federal Employees' Compensation Act, 5 U.S.C. 751-803 4

Federal Tort Claims Act, 28 U.S.C. 1346(b) 1, 3, 4, 7

Longshoremen's and Harborworkers' Compensation Act:

33 U.S.C. 901, et seq. 3

33 U.S.C. 901-950 4

33 U.S.C. 933 ..... 4, 12, 13

5 U.S.C. 150k 4, 10, 11, 15

5 U.S.C. 150k-1 ..... 4, 10, 11

5 U.S.C. 150k-1(c) 12

28 U.S.C. 1254(1) 2

28 U.S.C. 1291 7

Miscellaneous

Naval Civilian Personnel Instruction 66, Sections 2-1, 2-2, 2-3, 4-1, 4-2 ..... 3, 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. .

FERNANDO S. FORFARI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Fernando S. Forfari, plaintiff in the District Court for the Northern District of California, Northern Division, appellee in the United States Court of Appeals for the Ninth Circuit, petitions for a writ of certiorari to the latter Court, to review the judgment of said Court of Appeals which reversed a judgment for plaintiff-appellee Forfari for $12,673.26 under the Federal Tort Claims Act (28 U.S.C. 1346(b)) on

the ground that "Forfari was at the time of his injury a federal employee, and that he is precluded from bringing an action under the Tort Claims Act."

OPINIONS OF LOWER COURTS.

The District Court wrote two Opinions (only the first of which is material on this petition) neither of which is officially reported. They appear respectively at pp. 10 and 13 of the record; and are respectively Appendices "A" and "B" to this petition.

The opinion of the Court of Appeals has not yet been officially reported; it appears at p. 128 of the Record, and is Appendix "C" to this petition.

JURISDICTION STATEMENT.

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered and entered June 8, 1959, and appears as Appendix "D" to this petition. On August 24, 1959, Mr. Justice Black signed an order extending petitioner's time to petition for certiorari, to and including October 6, 1959. The Supreme Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Two questions are presented for review:

(1) Where employees of a non-appropriated fund agency are covered by private employers' (State of

California) workmen's compensation insurance (and later compulsorily covered by private employers' insurance under the Longshoremen's and Harborworkers' Compensation Act (33 U.S.C. 901, et seq.), is the remedy *of compensation* intended to preclude a damage suit under the Federal Tort Claims Act (28 U.S.C. 1346(b)) against the United States as *a third party tort-feasor* (the private compensation statutes authorizing such third party suits)?

(2) Where employees of a non-appropriated fund agency are *covered by private workmen's compensation insurance,* are they to be considered employees of the United States, so as to bar a third party tort-feasor suit against the United States under the Federal Tort Claims Act?

STATUTES INVOLVED.

The following statutes are involved either directly or indirectly:

(1) *Directly*

(a) The Federal Tort Claims Act, 28 U.S.C. 1346(b);

(b) The California Workmen's Compensation Act, Cal. Labor Code, secs. 3201-6149, especially sec. 3852, authorizing damage suits against third party tort-feasors;

(c) Naval Civilian Personnel Instruction 66, secs. 2-1, 2-2, 2-3, 4-1, 4-2;

(d) California Insurance Code, secs. 11770, 11774, 11778, 11779 (the nature and powers of the California State Compensation Insurance Fund).

(2) *Indirectly*

(a) Longshoremen's and Harborworkers' compensation Act, 33 U.S.C. 901-950, especially 33 U.S.C. 933, authorizing damage suits against third party tort-feasors;

(b) 5 U.S.C. 150k;

(c) 5 U.S.C. 150k-1 (before and after 1958 amendment);

(d) 5 U.S.C. 150k-1, as amended 1958;

(e) Federal Employees' Compensation Act, 5 U.S.C. 751-803.

The following are set forth verbatim in Appendix "D" to this petition:

(1) (a) 28 U.S.C. 1346(b);

(b) Cal. Lab. Code, sec. 3852;

(c) Cal. Ins. Code, secs. 11770, 11774, 11778, 11779;

(d) Naval Civilian Personnel Instruction 66, secs. 2-1, 2-2, 2-3, 4-1, 4-2.

(2) (a) 33 U.S.C. 933;

(b) 5 U.S.C. 150k;

(c) 5 U.S.C. 150k-1 before 1958 amendment;

(d) 5 U.S.C. 150k-1 as amended 1958.

STATEMENT OF CASE.

(The parties will be referred to by their trial Court designations of plaintiff and defendant.)

(R. 15) (Findings of Fact):

Finding 1. "That this Court has jurisdiction of this cause of action by reason of the provisions of the Federal Tort Claims Act, Title 28, U.S.C., Sections 921-946. That on November 21, 1951, at or about 1:00 o'clock p.m., plaintiff sustained personal injuries as a result of a fall down a staircase in a building owned and maintained by the United States of America, located at the Mare Island Naval Yard, Vallejo, California."

Finding 2. "At the time of his fall, plaintiff was an employee of the Mare Island Cafeteria System, a non-appropriated fund agency organized for the purpose of supplying food to the naval yard employees. Plaintiff was working in the Commissioned Officers' Club, also a non-appropriated fund agency."

Finding 3. "That on the date of plaintiff's accident and fall as aforesaid, the defendant, United States of America, was negligent in:

(1) Failing to provide a hand rail on the right hand side descending of said staircase,

(2) Permitting the protrusion of steel strips affixed to the edge of each step in such a manner that they created a hazard to persons walking down said steps, and

(3) Failure to properly light the staircase at the time in question."

At the time of his accident plaintiff was covered by private employers' compensation insurance under the

California Workmen's Compensation Act, the insurance carrier being the California State Compensation Insurance Fund. (R. 22-23, 35-36; R. 79-80, Plaintiff's Exs. 1 and 2; Conclusions of Law 3, R. 17; Judgment, 2 R. 18, Opinion Court of Appeals, R. 133-4.)

(R. 16) Finding 8—

> "That by reason of the negligence of the defendant and as a proximate result thereof, plaintiff required and received medical and hospital care and attention supplied and paid for by the California State Fund Insurance Company, insurance carrier for plaintiff's employer, in the amount of Four Thousand Eighty-five and 76/100 Dollars ($4,085.76)."

The non-appropriated agencies were and are civilian agencies, under direction of Naval personnel, but dependent entirely on money which they themselves make as a business; they are neither supported nor aided by tax money; surplus profits are used to increase and improve the services which these agencies render. (Opinion of Court of Appeals, R. 130-31; R. 45-48, 51-2.)

The Court of Appeals concluded (1) that the plaintiff's remedy by workmen's compensation precluded a third party tort-feasor's suit; and (2) that the plaintiff was an employee of the United States. (We believe these two issues are separate, though the Court of Appeals did not separate them.)

JURISDICTION OF LOWER COURTS.

The District Court had jurisdiction of the action under 28 U.S.C. 1346(b) (Federal Tort Claims Act); the District Court for the Northern District of California, Northern Division had jurisdiction because the accident happened at the Mare Island Navy Yard, Vallejo, California. (Findings, R. 14-15.)

The Court of Appeals had jurisdiction on the appeal of the Government under 28 U.S.C. 1291.

REASONS FOR GRANTING WRIT OF CERTIORARI.

A writ of certiorari should be granted for the following reasons:

(1) There is a conflict among the circuits as to whether employees of non-appropriated fund agencies may sue the United States as a third party tort-feasor, apart from their *private workmen's compensation* (albeit that the conflicting decisions in the Second and Seventh Circuits are District Court cases only);

(2) The Court of Appeals misapplies both *Standard Oil Co. v. Johnson,* 316 U.S. 481, and *Johansen v. U. S.,* 343 U.S. 427, in holding that the employees of non-appropriated fund agencies placed under the *private* workmen's compensation, first of the California Workmen's Compensation Act and later of the Longshoremen's and Harborworkers' Compensation Act, must look to compensation as their only remedy, though *both acts provide for the additional remedy of a third party tort-feasor's suit;*

(3) The Court of Appeals misapplies the relevant statutes and the reasoning of *Johansen v. U. S.*, 343 U.S. 427, in holding employees of non-appropriated fund agencies to be employees of the United States, although placing them under *private workmen's compensation* indicates the intention *not* to treat them as employees of the United States.

We discuss these points in order.

---

(1) CONFLICT AMONG CIRCUITS.

As the Court of Appeals recognizes, the District Courts of the Second and Seventh Circuits have held that employees of non-appropriated fund agencies may sue the United States under the Federal Tort Claims Act. *Falen v. U. S.* (D.C.E.D. N.Y. 1949) 125 F.S. 630; *Daniels v. Chanute Air Force Base Exchange* (D.C.E.D. Ill. 1955) 127 F.S. 920.

While it is true that these are District Court cases only, it is also true that the Court of Appeals of the Ninth Circuit cannot reverse them, but must "disagree" with them, as it would with the decision of another Court of Appeals. As the authorities stand now, there is an unresolved conflict among the Circuits.

The District of Columbia Circuit has held the same as the Ninth Circuit in the case at bar. *Aubrey v. U. S.*, 254 F. 2d 768.

(2)-(3) REMEDY OF WORKMEN'S COMPENSATION NOT ONLY REMEDY.

The Court of Appeals relies on *Standard Oil Co. v. Johnson,* 316 U.S. 481, and *Johansen v. U. S.,* 343 U.S. 427 and cases which derive from them, for its holding that plaintiff's workmen's compensation remedy is his only remedy.

But *Standard Oil Co. v. Johnson,* 316 U.S. 481, is inconclusive; and the reasoning of *Johansen v. U. S.,* 343 U.S. 427, leads to the opposite result.

(a) *Standard Oil Co. v. Johnson,* 316 U.S. 481, involved the question whether a *State* could tax the gasoline used at an army post exchange.

First, the question was one of constitutional law—the relative fields of Federal and State power. There was *no expression of Congressional intent* to permit state taxation in a field which was *prima facie* federal. Cf. cases holding that such immunity exists only *in the absence of Congressional consent: Smith v. Davis,* 323 U.S. 111, 113; *U. S. v. Allegheny County,* 322 U.S. 174, 176; *U. S. v. Detroit,* 355 U.S. 466, 469.

The constitutional issue of taxation is, of course, a different one from any statutory question of remedies available to employees for personal injuries; general language in the *Johnson* case must be read in the light of its facts. (*Cohens v. Virginia,* 19 U.S. 264, 399-400.)

Second. While *Standard Oil v. Johnson,* 316 U.S. 481 dealt with the situation where Congress had *not* given its consent to state taxation of government instrumentalities, the present case involves a situation

where Congress *has given its consent first* that workmen's compensation shall *not be the only remedy* of the employees of the non-appropriated fund agencies, and *second* that the United States should *not be considered the employer of such employees.* We give the reasons for this conclusion *infra* in the discussion of *Johansen v. U. S.*, 343 U.S. 427.

(b) The reasoning of *Johansen v. U. S.*, 343 U.S. 427, itself leads to the conclusion that—(1) Congress did not intend workmen's compensation to be the only remedy for employees of non-appropriated fund agencies; and (2) that Congress did not intend that the United States be in the position of employer of this class of personnel (for which reason they can sue the United States as a third-party tort-feasor).

First. Forfari's accident happened on November 21, 1951—before both the enactment (1952) of 5 U.S.C. 150k and 150k-1, and before the 1958 amendment to the latter section. The Court of Appeals gives the following summary of the purpose and effect of 5 U.S.C. 150k, as passed in 1952 (R. 131-132):

> "In June of 1952, Congress enacted (66 Stat. 138) 5 U.S.C. § 150k, which expressly exempted civilian employees of non-appropriated fund activities from the operation of the Civil Service Commission and the provisions of the Federal Employees Compensation Act. The legislative history of this Act clearly shows that the Act was passed to allay the doubts raised by the *Standard Oil* case, *supra*, as to whether or not the various Civil Service laws and regulations were applicable to civilian employees of non-appropriated

fund activities. The Civil Service Commission believed that as a result of the *Standard Oil* case 'it was necessary to consider persons employed in these activities as federal employees and subject to the usual personnel laws.'"

Second. In 1952, 5 U.S.C. 150k expressly removed non-appropriated fund employees from the Federal Employees Compensation Act and the 1958 amendment to 5 U.S.C. 150k-1 expressly put employees of non-appropriated fund agencies under the Longshoremen's and Harborworker's Compensation Act. (See Appendix p. xxviii.)

Third. As the Court of Appeals says, prior to 1958, the Mare Island non-appropriated fund employees were covered under the California Compensation Act (R. 138):

> "However, as indicated in the legislative history, it was the practice of the exchanges, food services, and the like, to provide the workmen's compensation that the June, 1952, act later made mandatory. The Mare Island Cafeteria System did provide Forfari with such benefits. It is conceded that the California State Fund Insurance Company has awarded Forfari $4,085.76 for the injuries sustained by reason of his fall."

Before 1958, Congress *permitted* non-appropriated fund employees to be covered by state-administered private employers' workmen's compensation; in 1952 it expressly withdrew these employees from the Federal Employees' Compensation Act, and directed compensation *not less* than that of the Longshoremen's

and Harborworkers' Act; in 1958 it expressly put these employees under the Longshoremen's and Harborworkers' Compensation. The differences between the California Act and the Longshoremen's and Harborworkers' Act as regards this point are procedural and of no moment here. See Cal. Lab. Code, sec. 3852 and 33 U.S.C. 933, quoted in Appendix "D".)

Thus there has been a continuous practice (first *de facto*, and later crystallized by statute) of placing the employees of non-appropriated fund agencies under private employers' compensation, permitting a third party tort-feasor's suit.*

Fourth. The entire reasoning of *Johansen v. U. S.*, 343 U.S. 427, is that the *Federal Employees Compensation Act makes workmen's compensation the exclusive remedy against the United States* of all employees covered by that Act. (343 U.S. 427, 429, 431, 433, 436, 439-41.) Note particularly the language at p. 431—

> "These enactments were not usually directed toward cases where the United States *had already put aside its sovereign armor*, granting relief in other forms." (Italics added.)

But Forfari was not under the Federal Employees' Compensation Act.

---

*The provision of 5 USC 150k-1(c) as amended in 1958 that the named remedy shall be exclusive does not affect the question here: by incorporating the Longshoremen's and Harborworkers' Compensation Act by reference, 5 USC 150k-1(c) incorporates the double remedy which that act provides. While this amendment was several years subsequent to Forfari's injury, it is important in showing the *subsisting importance of the problem.*

Where compensation is to be paid under an act covering *private employers,* and entirely out of *funds accumulated from the profits of a business* operated like a private enterprise, it cannot be said that the United States has "put aside its sovereign armor". Rather, it has carefully segregated private activities, paid out of private funds, from its sovereign activities.

Furthermore, *Johansen v. U. S.*, 343 U.S. 427, states that the Federal Employees Compensation Act covers *all* employees of the United States (p. 439):

> "The Federal Employees Compensation Act 5 USC §§ 751 et seq. was enacted to provide for injuries to government employees in the performance of their duties. *It covers all employees.*" (Italics added.)

If so, then any employees who are placed under a different compensation act, are not employees of the United States Government for the purpose of remedies for industrial accidents. If they are not employees of the United States Government, they can sue the United States as a third party tort-feasor. This is a remedy provided both by the California Workmen's Compensation Act (Cal. Lab. Code 3852) and by the Longshoremen's and Harborworkers' Compensation Act. (33 U.S.C. 933.)

In view of this analysis, we submit that *Aubrey v. U. S.*, 254 F. 2d 768, makes an inadequate disposition of the matter. While both the *Johansen* and the *Aubrey* opinions were written by Justice Reed, we respectfully submit that the one-sentence conclusion on

this point in *Aubrey v. U. S.* is actually contrary to the reasoning of the *Johansen* case.

Aubrey v. U. S., 254 F. 2d 768, first shows the intent not to have public funds bear the cost of workmen's compensation of non-appropriated fund agencies (p. 771):

> "The requirement that the instrumentalities themselves provide the protection, by insurance or otherwise, was obviously intended to insure that the cost of such protection would be paid out of the proceeds of these self-supporting activities and not out of public funds."

Then, however, the District of Columbia Circuit says (p. 772):

> "We conclude that Aubrey is precluded from maintaining this suit under the Tort Claims Act by the principle set forth in Feres and Johansen that the Act was not intended to grant the right to sue the Government to one who has been provided another remedy against its own instrumentality . . . *We do not think the fact that the insurer is not the United States but a private insurance carrier requires a distinction between this case and Feres and Johansen.*". (Italics added.)

On the contrary, even under the language of *Johansen v. U. S.*, placing employees under a different compensation system from that of the Federal Employees Compensation Act, indicates an intention that they shall not be treated as employees of the United States for the purpose of industrial accidents.

Fifth. The Court below speculates that (R. 134):

> "We believe it is reasonable to say that, if in 1951 the Mare Island Cafeteria System had not provided its employees with workmen's compensation for injuries incurred by them in the scope of their employment, such injuries would have been compensable under the Federal Employees Compensation Act, and that it took the passage of § 150k in 1952 to remove employees such as Forfari from the protection afforded by the Federal Employees' Compensation Act."

But in 1951 private compensation for employees of non-appropriated fund agencies was operating at least *de facto,* and at least with the Government's tacit consent. When 5 U.S.C. 150k was passed in 1952, it approved and crystallized a system which was already in operation. It should be noted that, while in the above quotation the Court of Appeals seems to say that 5 U.S.C. 150k changed the existing system, at R. 134, it says just the opposite:

> "Yet, when the entire statutory system of remedies provided by the federal government for its employees is viewed in perspective, it is clear that such injuries *are and always have been* beyond the purview of the Tort Claims Act." (Italics added.)

We submit the correct conclusion is the opposite. The employees were first tacitly and later expressly under private workmen's compensation insurance rather than under the Federal Employees Compensation Act. This indicates an intention that they shall not be considered employees of the United States for

the purposes of workmen's compensation, and would permit them to sue the United States as a third party tort-feasor, to the extent permitted by the applicable private compensation act, and to the extent that tort liability may exist by the laws of the place of the accident.

CONCLUSION.

For the above stated reasons it is submitted that the writ of certiorari be granted.

Dated, San Francisco, California,
September 25, 1959.

Respectfully submitted,
GEORGE OLSHAUSEN,
Attorney for Petitioner.

ERNEST E. EMMONS, JR.,
THOMAS A. MULVIHILL,
Of Counsel.

(Appendices "A", "B", "C", "D" and "E" Follow.)

Appendix "A"

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

By this action, plaintiff seeks to recover for personal injuries which he sustained as a result of a fall down a staircase in a building owned by the United States at the Mare Island Naval Yard, Vallejo, California. At the time of his fall, plaintiff was an employee of the Mare Island Cafeteria System, a non-appropriated fund agency organized for the purpose of supplying food to the Naval Yard employees, working in the Commissioned Officers' Club, also a non-appropriated fund agency. The action is based on the provisions of Title 28 U.S.C.A. §1346(b), with the negligence of the United States claimed as being, (1) The failure to provide hand railing for the staircase, (2) The protrusion of steel strips affixed to the edge of each step in such a manner that they created a hazard, and (3) The failure to properly light the staircase. Defendant, United States of America, bases its defense on the grounds that plaintiff was contributorily negligent, and that plaintiff was an employee of the United States, and thus not entitled to recover under the Federal Tort Claims Act.

This action was tried by the Court sitting without a jury on October 24, 1956, at the conclusion of which trial, the Court ordered the matter submitted. For good cause, the Court, on November 1, 1956, vacated its previous order submitting the case for decision,

and ordered both parties to submit posttrial memoranda. On November 15, 1956, in compliance with the order of the Court, plaintiff filed his memorandum. Under the terms of the Court's order, defendant was required to file its answering memorandum within fifteen days after receipt of plaintiff's opening memorandum, and plaintiff was given the right to reply thereto. Counsel for plaintiff has certified that a copy of his opening memorandum was mailed to counsel for defendant, United States, on November 14, 1956. Upon examination of the file by the Court on July 22, 1957, the record disclosed that counsel for defendant has not only failed to make any effort to comply with the time limitation set forth in the Court's order, but has failed to file any memorandum whatsoever. The record is devoid of any reasons for this delay, if, indeed, such dereliction could ever be justified. Sufficient time having elapsed to allow defendant to make a response, it appears obvious from the record that defendant does not intent to respond. Accordingly, the matter has been ordered submitted as of July 22, 1957.

The failure of defendant to afford the Court any help in this matter might be taken as an indication that it does not desire to contest the contentions made by plaintiff. Certainly it puts the Court in the unenviable position of having to do the work that properly should be done by counsel for defendant.

Defendant contends that plaintiff is without status to propel a Federal Tort Claims action. With this, the Court does not agree. Plaintiff argues that he has

a right to recover from defendant for his injuries (he not being an employee of defendant at the time of the accident) under the common law rules of negligence. His position in this regard appears to the Court to be sound. The remaining issues to be resolved are whether defendant was negligent, and whether plaintiff was guilty of contributory negligence. From the record and the applicable law, it appears to the Court that defendant was negligent in its conduct toward plaintiff, and that plaintiff was not guilty of any negligence which contributed to the accident and/or his injuries.

The Court is of the view that on the issue of liability the judgment must be for plaintiff.

It Is, Therefore, Ordered that judgment be for the plaintiff on the issue of liability in this case, and that this case be set down for further trial on Friday, September 13th, 1957, for the purpose of fixing the damages sustained by the plaintiff. Each of the parties will be prepared to proceed on this date to present to the Court any evidence that may bear upon the issue of damages in this case. The issue of damages is the sole question that will be considered by the Court on the date last mentioned above.

Dated: August 2nd, 1957.

/s/ SHERRILL HALBERT
United States District Judge

[Endorsed]: Filed August 2, 1957.

Appendix "B"

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This Court has heretofore resolved the issue of liability in this case and supported its opinion in that regard by a Memorandum and Order, filed herein on August 2, 1957. By that order the matter was set down for further trial on the issue of damages on September 13, 1957. The trial on the issue of damages came on regularly for hearing on this latter date. Both parties appeared by their respective counsel, and in due course the matter was submitted for decision and determination by the Court.

After having given full consideration to all of the evidence adduced in this case, the Court has come to the conclusion that plaintiff is entitled to recover from the defendant, United States of America, damages in the sum of $12,673.26, and accordingly judgment will be entered in favor of the plaintiff and against the defendant in this amount.

It Is, Therefore, Ordered that plaintiff have judgment against the defendant, United States of America, in this action in the sum of $12,673.26 (This includes both general and special damages.), together with any costs which may be authorized by law. Plaintiff will prepare findings of fact and conclusions of law, a form of judgment and any and all other documents necessary to the final disposition of this case in ac-

cordance with this order, and lodge them with the Clerk of this Court at the time and in the manner prescribed by the applicable rules and statutes.

Dated: December 31, 1957.

/s/ SHERRILL HALBERT
United States District Judge

[Endorsed]: Filed December 31, 1957.

Appendix "C"

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellant, vs. Fernando S. Forfari, Appellee.	No. 16,032 June 8, 1959

Appeal from the United States District Court for the Northern District of California Northern Division

Before: HAMLEY, HAMLIN and JERTBERG, Circuit Judges.

HAMLIN, Circuit Judge:

The United States here appeals from a judgment of the District Court awarding Fernando S. Forfari damages in the amount of $12,673.26. Forfari's action was based on provisions of the Federal Tort Claims Act (28 U.S.C. 1346(b)).[1] Jurisdiction in this court rests on 28 U.S.C. § 1291.

[1] "§ 1346. United States as defendant

• • •

(b) . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Govern-

The accident giving rise to the suit occurred on November 21, 1951, in the Commissioned Officers' Mess at Mare Island Naval Shipyard, Vallejo, California. Forfari, a chef, sustained personal injuries when he slipped and fell down a flight of stairs which led from the kitchen to the employees' washroom in the Officers' Mess. The District Court found that the injuries were proximately caused by the negligence of the United States in certain particulars not here relevant.

The Government attacks this judgment by contending: (1) that Forfari was an employee of the United States and is therefore barred from bringing an action under the Federal Tort Claims Act, and/or (2) that Forfari, as an employee of a non-appropriated fund instrumentality of the United States, is precluded from bringing this action because of his recovery under the California Workmen's Compensation Act.

We agree with the contentions of the appellant.

Forfari, a civilian, was employed by the Mare Island Cafeteria System. The Cafeteria System was organized and operated under Navy Civilian Personnel Instruction 66,[2] for the purpose of supplying food

---

ment while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[2]Navy Civilian Personnel Instruction 66 provides in pertinent part:

"Section 2

• • •

"2-1. PURPOSES OF EMPLOYEE SERVICES.—The purposes of an employee services program are to keep employees informed of the policies and rules established by management, to make available for them where necessary those

to Naval Yard personnel. As a contract concessionaire, the Cafeteria System also provided food services to the Commissioned Officers' Mess at the Naval Shipyard. The Cafeteria System is operated as a non-

facilities which reduce to a minimum interruptions of work for personal affairs, and to provide bases for the development and continuance of interest in their jobs and places of work.

"2-2. DEPARTMENT POLICY.—It is the policy of the Department that a program of employee services based on the needs of the service be established in each naval activity. Only those services which contribute to morale, job interest, cooperation, better attendance, health, and productive output are considered justified under this program.

"2-3. ORGANIZATION AND ADMINISTRATION.—a. *Principles of operation.*—Employee services are an integral part of the Industrial Relations Program, and as such should consist only of facilities which contribute to the efficiency of the service. In no case should services be instituted which are adequately provided by community resources and care must be exercised to avoid providing facilities which offer competition to private business in the community. The Department, nevertheless, is concerned with steady day-to-day attendance and production of its employees, and where the absence of adequate community and business resources causes troublesome work interruptions, consideration should be given to the development of necessary employee services.

• • • •

"Section 4

• • • •

"4-1. GENERAL STATEMENT.—It is the policy of the Department of the Navy to make available such assistance and facilities as are necessary so that employees may provide for themselves in-plant food service where necessary and practicable. Food service in general includes cafeterias, lunch counters, canteens, and vending machines, which will be operated in conformance with the provisions of this Section. Under certain conditions General Mess and Commissary Stores will be made available to employees as outlined in NCPI 66.4-5 and 4-6.

"4-2. ADMINISTRATION OF FOOD SERVICE.—a. *Organization.*—Food service is operated for the benefit of all employees of an activity through the medium of employee representatives who determine operating policies and procedures, subject to approval of the head of the activity. Normally employee organization and participation may be initiated by the appointment by the head of the activity of a

profit corporation, managed by a civilian, and governed by a civilian board of directors. The Board of Directors reports to the Industrial Relations Officer, a naval officer, and its members are appointed by the naval officer commanding the shipyard.

Activities such as the Mare Island Cafeteria System are characterized as non-appropriated fund instrumentalities of the United States. It is settled law that such activities are integral parts of the Government's military services. *Standard Oil Co. v. Johnson,* 1942, 316 U.S. 481, held that Army post exchanges were arms of the federal government and as integral parts of the War Department partook of its immunity under the federal Constitution and statutes. *Nimro v. Davis,* (D.C. Cir., 1953) 204 F.2d 734, certiorari denied, 346 U.S. 901, held that Naval food services established under NCPI 66[3] serve the same purpose as Army post exchanges, perform a governmental function, and are arms of the United States.

Appellee concedes that the Cafeteria System is a federal instrumentality, but denies that this makes him a federal employee. Appellee, for this proposition,

---

five to seven member Cafeteria Association. However, the commanding officer may determine under certain circumstances that it is in the best interest of the employees and the activity to have some or all of the members of the Cafeteria Association designated through an elective process, or nominated by employee groups. In this manner employees and employee groups would be given the opportunity to select representatives responsible for the food service and its operation, subject to the provisions of this Section."

[3]Navy Civilian Personnel Instruction 66; see Footnote 2.

relies on *Faleni v. United States,* (D.C. N.Y., 1949) 125 F.Supp. 630.[4]

We are not in agreement with the *Faleni* case.[5] *Faleni* was decided in 1949. In June of 1952, Congress

---

[4]*Faleni v. United States* (D.C. N.Y., 1949) 125 F.Supp. 630, held that a civilian laundry worker employed by the "Ships Service Department" at a naval air station was not barred from bringing an action under the Tort Claims Act. The Court, in holding that Faleni was not an employee of the United States, emphasized that the plaintiff's salary was not paid from funds appropriated by Congress, that the Ships Service paid its own obligations for maintenance and upkeep, and carried its own insurance for its equipment.

Daniels v. Chanute Air Force Base Exchange (Ill., 1955) 127 F.Supp. 920, although expressly rejecting *Faleni's* basis for holding that Faleni was *not* a federal employee, held that an employee of an Air Force Base Exchange *was* a federal employee, but *could* bring an action under the Tort Claims Act, because 5 U.S.C. 150k-1 did not at that time make that the exclusive remedy. We disagree with the *Daniels* case.

[5]The rationale of *Faleni* (see footnote 4, supra) appears to us to be wholly inconsistent with the following excerpts from *Standard Oil Co. v. Johnson*, 1942, 316 U.S. 481:

> "Congressional recognition that the activities of post exchanges are governmental has been frequent. Since 1903, Congress has repeatedly made substantial appropriations to be expended under the direction of the Secretary of War for construction, equipment, and maintenance of suitable buildings for post exchanges. In 1933 and 1934, Congress ordered certain moneys derived from disbanded exchanges to be handed over to the Federal Treasury.
>
> • • • •
>
> "The Government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops."

enacted (66 Stat. 138) 5 U.S.C. § 150k,[6] which expressly exempted civilian employees of non-appropriated fund activities from the operation of the Civil Service Commission and the provisions of the Federal Employees Compensation Act. The legislative history of this Act[7] clearly shows that the Act was passed to allay the doubts raised by the *Standard Oil* case, *supra*, as to whether or not the various Civil Service laws and regulations were applicable to civilian employees of non-appropriated fund activities. The Civil Service Commission believed that as a result of the *Standard Oil* case "it was necessary to consider persons employed in these activities as federal employees and subject to the usual personnel laws."[8]

---

[6]"§ 150k. Civilian employees not subject to laws administered by Civil Service Commission

Civilian employees, compensated from nonappropriated funds, of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act, as amended: *Provided*, That the status of these nonappropriated fund activities as Federal instrumentalities shall not be affected. June 19, 1952, c. 444, § 1, 66 Stat. 138."

[7]Senate Report No. 1341, 82d. Cong., Second Sess. (1952); House Report No. 1995, 82d. Cong., Second Sess. (1952); 2 U.S. Code Congressional & Administrative News (1952), p. 1520.

[8]Letter dated July 23, 1951, from Robert Ramspeck, the chairman of the Civil Service Commission, to Hon. Tom Murray, Chairman of the Committee on Post Office Civil Service, H.R. (2 U.S.Code & Admin. News, 1952, p. 1523).

The Department of Defense did not believe these employees should be included within the federal civil service. The Department of Defense pointed up the administrative difficulties that would result if all such employees (many of whom were employed and released daily) were subject to its laws. Thus, 5 U.S.C. 150k was enacted, providing that civilian employees in Forfari's status "shall not be held and considered as employees of the United States *for the purposes* of any laws administered by the Civil Service Commission or the provisions of the Federal Employees Compensation Act. . . ." [Emphasis added]

In addition to specifically exempting these employees from civil service regulation and federal employee compensation benefits, § 150k-1 of the Act required the non-appropriated fund activities to provide the employees with workmen's compensation and employer's liability insurance.[9] House Report No. 1995 stated that the Act thus assured the employees that "their present benefits provided through private insurance for workmen's compensation and employer's liability will be continued."

---

[9] 5 U.S.C.A. 150k-1 was amended on July 18, 1958 (Public Law 85-538, § 1, 72 Stat. 397). As amended, 150k-1 now makes the Longshoremen's and Harbor Workers' Compensation Act applicable to civilian employees of any nonappropriated fund instrumentality described in § 150k. The amendment further provides that "such liability shall be exclusive and in the place of all other liability of the United States. . . ."

Thus, if Forfari's injuries had been sustained at the date of this writing there would be no question but that he would have a right to compensation under the Longshoremen's and Harbor Workers' Compensation Act and would not have a right to sue under the Tort Claims Act.

Thus 5 U.S.C. 150k and 150k-1 serve these two purposes: (1) to render inapplicable civil service control over such employees (because of the administrative difficulties), and (2) to place the financial burden of compensation insurance for such employees on the non-appropriated fund activities rather than on the federal government. 150k, however, expressly provided that the status of these non-appropriated fund activities as federal instrumentalities should not be affected.

Forfari's accident occurred on November 21, 1951, some seven months prior to the passage of §§ 150k and k-1. However, as indicated in the legislative history, it was the practice of the exchanges, food services, and the like, to provide the workmen's compensation that the June, 1952, act later made mandatory. The Mare Island Cafeteria System did provide Forfari with such benefits. It is conceded that the California State Fund Insurance Company has awarded Forfari $4,085.76 for the injuries sustained by reason of his fall.

We believe that it is reasonable to say that, if in 1951 the Mare Island Cafeteria System had not provided its employees with workmen's compensation for injuries incurred by them in the scope of their employment, such injuries would have been compensable under the Federal Employees' Compensation Act, and that it took the passage of § 150k in 1952 to remove employees such as Forfari from the protection afforded by the Federal Employees' Compensation Act.

It was not until 150k-1 was amended in 1958 that the protection afforded by that statute was expressly

made the exclusive remedy of those within its scope. Yet, when the entire statutory system of remedies provided by the federal government for its employees is viewed in perspective, it is clear that such injuries are, and always have been, beyond the purview of the Tort Claims Act. ". . . the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred." *Rayonier, Inc. v. United States,* 1957, 352 U.S. 315.

Under the California law, of course, this on-the-job injury would be compensable under Workmen's Compensation and unless the employer failed to carry such insurance, the injured employee could not bring an action in tort against his employer. California Labor Code, § 3601. *Duprey v. Shane,* 1952, 39 Cal. 2d 781, 249 P.2d 8.

The states have enacted their workmen's compensation schemes and made the remedies provided therein exclusive for industrial accidents. The federal statutory scheme, though providing various remedies for its various classifications of employees, is of the same import. Thus, *Feres v. United States,* 1950, 340 U.S. 135, in holding that the government was not liable under the Tort Claims Act for injuries to military personnel sustained while on active duty, said:

> "This court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of

simple, certain and uniform compensation for injuries or death of those in the armed services."

In *Johansen v. United States*, 1952, 343 U.S. 427,[10] the Court held a civilian employee of the United States on a "public vessel" was precluded from seeking recovery under the Public Vessels Act. The Federal Employees Compensation Act was his exclusive remedy. The Court said that it must "attempt to fit the Public Vessels Act as intelligently and fairly as possible into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole."[11]

A recent case, decided by the District of Columbia Circuit, is particularly worthy of note: *Aubrey v. United States*, (D.C., 1958) 254 F.2d 768. In *Aubrey*, despite a pre-trial stipulation that the plaintiff, a civilian employee of an officers' mess, was not a fed-

[10]Recently, in *Patterson v. United States*, No. 429, October Term, 1958 (Decided May 18, 1959), the Supreme Court was asked to reconsider the Johansen case. The Court reaffirmed *Johansen*, and stated: "The United States 'has established by the Compensation Act a method of redress for its employees. There is no reason to have two systems of redress.'"

[11]It is worthy of note that the Federal Employees Compensation Act was not *expressly* made the exclusive remedy for federal employees until 1949. In answer to a contention that this indicated that prior to 1949 it was not the exclusive remedy, the Supreme Court said:

> "The background of the amendment shows, however, that this impression is erroneous. . . . The purpose of the 1949 amendment is simply 'to make it clear that the right to compensation benefits under the Act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities. . . .' Senate Report 836, 81st Cong., First Sess., p. 23."

'eral employee, the Court held that he was precluded from maintaining a Tort Claims action. The Court of Appeals said:

> "We conclude that Aubrey is precluded from maintaining this suit under the Tort Claims Act by the principle set forth in Feres and Johansen that the Act was not intended to grant the right to sue the government to one who has been provided another remedy against its own instrumentality by the government through a system 'of simple, certain and uniform compensation for injuries and death.' The compensation system provided for plaintiff Aubrey must, like the Tort Claims Act, 'be construed to fit so far as will comport with its words into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole'."

While Aubrey's injuries were sustained after the passage of the 1952 Act (5 U.S.C. 150k, k-1) and Forfari's injuries were sustained shortly before that Act, we do not believe that that fact is decisive of this appeal. The 1952 Act (150k, k-1) on the one hand denied such employees a remedy under F.E.C.A. and on the other hand required the civilian instrumentalities to provide Workmen's Compensation. The Act neither altered the status of Forfari's employment, nor affected the nature of his accident. This was a "scope of employment" type injury—compensable under Workmen's Compensation in virtually every state in the Union, and under F.E.C.A. for federal employees. The fact that at the time of this injury the financial

obligations as between the federal government and the civilian instrumentality of the government had not been clearly delineated, does not transform this compensable industrial accident into an action under the Tort Claims Act.

We hold that Forfari was at the time of his injury a federal employee and that he is precluded from bringing an action under the Tort Claims Act.

The judgment of the District Court is reversed.

(Endorsed:) Opinion. Filed June 8, 1959.

Paul P. O'Brien, Clerk.

Appendix "D"

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellant, vs. Fernando S. Forfari, Appellee.	No. 16,032

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed.

Filed and entered June 8, 1959.

Appendix "E"

STATUTES

28 U.S.C. 1346. United States as defendant

* * *

(b) . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Cal. Labor Code § 3852. Action against third person; rights of employee and employer. The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for

which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents.

Cal. Insurance Code.

§ 11770. Continuance of fund: Administration: Purpose: Appropriations: Board of directors: Members: Terms: Expenses and compensation: Qualifications. The State Compensation Insurance Fund is continued in existence, to be administered by its board of directors for the purpose of transacting workmen's compensation insurance, and insurance against the expense of defending any suit for serious and wilful misconduct, against an employer or his agent, and insurance to employees and other persons of the compensation fixed by the workmen's compensation laws for employees and their dependents. Any appropriation made therefrom or thereto before the effective date of this code shall continue to be available for the purposes for which it was made.

The board of directors of the State Compensation Insurance Fund is composed of the Director of Industrial Relations, who is chairman thereof, and four members who shall be appointed by the Governor. The term of office of the members of the board, other than that of the director, shall be four years and they shall hold office until the appointment and qualification of their successors. The terms of the first four members so appointed shall expire as follows: One

on January 15, 1946; one each on January 15, 1947, January 15, 1948, and January 15, 1949. Each member shall receive his actual and necessary traveling expenses incurred in the performance of his duty as a member and, except the Director of Industrial Relations, twenty dollars ($20) for each day of his actual attendance at meetings of the board. In order to qualify for membership on the board, each member other than the director shall have been a policyholder or the employee of a policyholder in the State Compensation Insurance Fund for one year prior to his appointment, and must continue in such status during the period of his membership.

§ 11774. Application of assets of fund. The assets of the fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of the salaries and other expenses charged against it in accordance with the provisions of this chapter.

§ 11778. Transaction of workmen's compensation insurance: Scope of authority. The fund may transact workmen's compensation insurance required or authorized by law of this State to the same extent as any other insurer.

§ 11779. Federal compensation insurance. The fund may insure employers against their liability for compensation or damages under the United States Longshoremen's and Harbor Workers' Compensation Act, as fully as any private insurer.

2 Navy Civilian Personnel Instruction 66 provides in pertinent part:

"Section 2

* * *

"2-1. Purposes of employee services.—The purposes of an employee services program are to keep employees informed of the policies and rules established by management, to make available for them where necessary those facilities which reduce to a minimum interruptions of work for personal affairs, and to provide bases for the development and continuance of interest in their jobs and places of work.

"2-2. Department policy.—It is the policy of the Department that a program of employee services based on the needs of the service be established in each naval activity. Only those services which contribute to morale, job interest, cooperation, better attendance, health, and productive output are considered justified under this program.

"2-3. Organization and administration.—a. Principles of operation.—Employee services are an integral part of the Industrial Relations Program, and as such should consist only of facilities which contribute to the efficiency of the service. In no case should services be instituted which are adequately provided by community resources and care must be exercised to avoid providing facilities which offer competition to private business in the community. The Department, nevertheless, is concerned with steady day-to-day attendance and production of its employees,

and where the absence of adequate community and business resources causes troublesome work interruptions, consideration should be given to the development of necessary employee services.

* * *

"Section 4

* * *

"4-1. General statement.—It is the policy of the Department of the Navy to make available such assistance and facilities as are necessary so that employees may provide for themselves in plant food service where necessary and practicable. Food service in general includes cafeterias, lunch counters, canteens, and vending machines, which will be operated in conformance with the provisions of this Section. Under certain conditions General Mess and Commissary Stores will be made available to employees as outlined in NCPI 66.4-5 and 4-6.

"4-2. Administration of food service.—a. Organization.—Food service is operated for the benefit of all employees of an activity through the medium of employee representatives who determine operating policies and procedures, subject to approval of the head of the activity. Normally employee organization and participation may be initiated by the appointment by the head of the activity of a five to seven member Cafeteria Association. However, the commanding officer may determine under certain circumstances that it is in the best interest of the employees and the activity to have some or all of the members of the Cafeteria

Association designated through an elective process, or nominated by employee groups. In this manner employees and employee groups would be given the opportunity to select representatives responsible for the food service and its operation, subject to the provisions of this Section."

---

33 U.S.C. 933. Compensation for injuries where third persons are liable.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages

against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such

compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this title, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) of this section only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this chapter is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section. Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 685, §§ 12, 13, 52 Stat. 1168; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

---

5 U.S.C. § 150k. Civilian employees not subject to laws administered by Civil Service Commission.

Civilian employees, compensated from nonappropriated funds, of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act, as amended: *Provided,* That the status of these nonappropriated fund activities as Federal instrumentalities shall not be affected. June 19, 1952, c. 444, § 1, 66 Stat. 138.

5 U.S.C. 150k-1 (before 1958 Amendment—66 Stats. at L. 139, sec. 2).

The nonappropriated fund instrumentalities described in the first section of this act [i.e. sec. 150k] shall provide their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment. In the case of employees employed in the continental United States (except Alaska), compensation shall be not less than that provided by the laws of the State (or the District of Columbia) in which the employing activity of any such instrumentality is located. In the case of employees employed outside the continental limits of the United States and in Alaska, compensation shall be not less than that provided in sections 7, 8, and 9 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1427-1430), as amended, except that in the case of such employees who are not citizens of the United States, compensation shall be in accordance with regulations to be prescribed by the Secretary of the Army, Navy, Air Force, or Treasury, as the case may be. This section shall take effect sixty days after the date of enactment of this Act.

Approved June 19, 1952.

5 U.S.C. § 150k-1 (as amended 1958). Same: death or disability compensation; definitions; compensation districts; judicial proceedings; regulations; exclusiveness of remedy.

(a) The Longshoremen's and Harbor Workers' Compensation Act shall apply with respect to the disa-

bility or death resulting from injury, as defined in section 902(2) of Title 33, occurring to a civilian employee of any nonappropriated fund instrumentality described in section 150k of this title, subject to the following provisions of this section:

(1) For the purposes of section 150k of this title and this section, the term "employee" in section 902(3) of Title 33 shall include only—

(A) those employees of such nonappropriated fund instrumentalities as are employed within the continental United States and

(B) those United States citizens or permanent residents of the United States or a Territory who are employees of such nonappropriated fund instrumentalities outside the continental limits of the United States.

(2) For the purposes of section 150k of this title and this section, the term "employer" in section 902(4) of Title 33 shall include each of the nonappropriated fund instrumentalities described in section 150k of this title.

(3) For the purposes of section 150k of this title and this section, only that part of section 903(a) of Title 33 which precedes the first comma shall apply.

(4) The Secretary of Labor is authorized—

(A) to extend compensation districts established under section 939(b) of Title 33, or to establish new districts to include the areas outside the continental limits of the United States and

(B) to assign to each such district one or more deputy commissioners as the Secretary deems advisable.

Judicial proceedings under sections 918 and 921 of Title 33 with respect to any injury or death occurring outside the continental limits of the United States shall be instituted in the district court within the territorial jurisdiction of which is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such district).

(b) In case of disability or death resulting from injury, as defined in section 902(2) of Title 33, of an employee who is not a citizen or permanent resident of the United States or a Territory, employed outside the continental limits of the United States by any nonappropriated fund instrumentality described in section 150k of this title, compensation shall be provided in accordance with regulations prescribed by the Secretary of the military department concerned and approved by the Secretary of Defense or regulations prescribed by the Secretary of the Treasury, as the case may be.

(c) The liability of the United States or of any nonappropriated fund instrumentality described in section 150k of this title, with respect to the disability or death resulting from injury, as defined in section 902(2) of Title 33, of any employee referred to in subsection (a) or (b) of this section, shall be de-

termined as provided in section 150k of this title and this section. Such liability shall be exclusive and in the place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any person otherwise entitled to recover damages from the United States or such nonappropriated fund instrumentality on account of such disability or death in any direct judicial proceedings, in a civil action, or in admiralty, or by proceedings whether administrative or judicial, under any workmen's compensation law or under any Federal tort liability statute. June 19, 1952, c. 444, § 2, 66 Stat. 139, amended July 18, 1958, Pub. L. 85-538, § 1, 72 Stat. 397.

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 30 1959
JAMES R. BROWNING, Clerk

No. 453

In the Supreme Court of the United States

OCTOBER TERM, 1959

FERNANDO A. SOBERAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
ROBERT S. ERDAHL,
HARRY D. SUSMAN,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Aubrey v. *United States*, 254 F. 2d 768	3
Feres v. *United States*, 340 U.S. 135	7, 8
Johansen v. *United States*, 343 U.S. 427	7, 8
Lewis v. *United States*, 190 F. 2d 22, certiorari denied, 342 U.S. 869	7
Nimro v. *Davis*, 204 F. 2d 734, certiorari denied, 346 U.S. 901	6
Standard Oil Co. v. *Johnson*, 316 U.S. 481	5, 6
Statutes:	
Act of June 19, 1952, 66 Stat. 138, 139, 5 U.S.C. (1952 ed.) 150k, 150k–1	5, 6, 7, 9, 11
Act of July 18, 1958, 72 Stat. 397, 5 U.S.C. 150k–1	5, 6, 7, 12
Federal Tort Claims Act, 28 U.S.C. 1346	3, 6, 9, 11
Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, *et seq.*, 33 U.S.C. (1952 ed.) 901–950, Section 5	5, 15
Miscellaneous:	
H.R. Rept. No. 1995, 82d Cong., 2d Sess. 3–4	6
Navy Civilian Personnel Instruction 66, Section 2–2	4
Rule 19 of the Revised Rules of the Supreme Court of the United States	9

529290—59

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 452

FERNANDO S. FORFARI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The two opinions of the United States District Court for the Northern District of California, Northern Division (R. 10, 13; Pet. App., pp. i, iv) are unreported. The opinion of the Court of Appeals (R. 128; Pet. App., p. vi) is reported at 268 F. 2d 29.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1959. On August 24, 1959, Mr. Justice Black signed an order extending the time to file a petition for a writ of certiorari to and including October 6, 1959. The petition for a writ of certiorari

was filed on October 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a civilian employee of a federal instrumentality, which is operated as an integral part of the federal military service on non-appropriated funds rather than on congressionally-appropriated funds, may recover damages under the Federal Tort Claims Act for work injuries sustained by him in the course of his employment and for which he has received workmen's compensation benefits.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra,* pp. 11–15.

STATEMENT

Petitioner was employed as a chef by the Mare Island Cafeteria System, a non-appropriated fund federal agency, organized and operated under Navy regulations for the purpose of supplying food to personnel at the Mare Island Naval Shipyard (R. 15). The Cafeteria System provided food service to the Commissioned Officers' Club, another non-appropriated fund agency (R. 66–72).

On November 21, 1951, petitioner sustained personal injuries when he slipped and fell down a flight of stairs located in the Officers' Club in which he was performing his duties (R. 26–27, 48). By reason of the injuries incurred in this accident, petitioner received medical and hospital care paid for by the California State Fund Insurance Company in the amount of $4,085.76 (R. 16). This company was

the workmen's compensation insurance carrier for the Cafeteria System (petitioner's employing agency), and the amount of the compensation award was fixed by the Industrial Accident Commission of the State of California.

Petitioner brought this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b) (App., *infra*, p. 11), seeking to recover additional damages from the United States for his injuries. The District Court found that petitioner's injuries had been proximately caused by the negligence of the United States in failing to provide a hand-rail on the staircase, in permitting the protrusion of steel strips at the edge of each step, and in failing to light the staircase properly (R. 15). It held that petitioner was not precluded from maintaining this suit, and awarded him damages of $12,673.26.

The Court of Appeals reversed, holding that petitioner could not maintain an action under the Tort Claims Act. That court held that petitioner had been a federal employee at the time of his injury and that, in view of the workmen's compensation remedy afforded him, he was not entitled to an additional remedy under the Tort Claims Act (R. 123–136). The court also cited with approval *Aubrey* v. *United States*, 254 F. 2d 768 (C.A.D.C.), which had held that, even where an employee of a federal instrumentality cannot be characterized as a federal employee, his receipt of compensation benefits will constitute his exclusive remedy against the Government for injuries sustained in the course of his employment (R. 135–136).

ARGUMENT

The issue in this case has been stripped of all prospective importance by recent legislative action. In addition, the holding below is clearly correct and there is no conflict with any other court of appeals. Accordingly, there is no occasion for review here.

1. Statutory changes in the applicable law, in 1958, have rendered the question raised here of no prospective importance. In this legislation Congress has clarified the legal status of non-appropriated fund activities and has explicitly prescribed the remedies exclusively available to employees of these activities who incur injuries while peforming their employment duties.

Non-appropriated fund agencies, such as that which employed petitioner, are unincorporated entities which have been established by the regulations of a department of the United States Government for the purpose of conducting a variety of activities for the benefit of military personnel or civilian employees of the department. These agencies are permitted to employ the funds which their activities produce rather than covering them into the Treasury and then withdrawing them by appropriation. But no person has a proprietary interest in these funds and any profits do not accrue to individuals. The programs of these agencies are devoted exclusively to those services which contribute to departmental morale, job interest, cooperation, better attendance, health and productive output. See, *e.g.*, Navy Civilian Personnel Instruction 66, Section 2–2 (Pet. App., p. xxii). It is settled

that such non-appropriated fund activities are integral parts of the Government's military services. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481.

In June 1952, Congress enacted 66 Stat. 138, 5 U.S.C. (1952 ed.) 150k–1 (App., *infra*, p. 11), which required non-appropriated fund activities to provide their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment. Then, in 1958, Congress replaced this requirement with the present provision, making the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. (1952 ed.) 901–950, applicable to civilian employees of non-appropriated fund instrumentalities of the military department, 72 Stat. 397, 5 U.S.C. 150k–1 (App., *infra*, p. 12). The 1958 amendment expressly provides that the remedy under the Longshoremen's and Harbor Workers' Compensation Act granted these employees by this legislation "shall be exclusive and in the place of all other liability of the United States * * *."[1]

Thus, there can be no doubt that, under present law, employees such as petitioner are granted a compensation remedy under the Longshoremen's and Harbor Workers' Compensation Act and that, by virtue of the express exclusivity provision in the 1958 amendment of 5 U.S.C. 150k–1, no additional remedy may be sought against the United States under the

[1] The Longshoremen's and Harbor Workers' Compensation Act provides a compensation remedy and, in explicit terms, itself states that this remedy "shall be exclusive and in the place of all other liability of the United States or such instrumentality to the employee * * *." 44 Stat. 1426, 33 U.S.C. (1952 ed.) 905 (App. 15).

Tort Claims Act.[2] The question raised by the petition can have no future or continuing importance.

2. As the court below held, petitioner was a federal employee and, as such, cannot maintain a suit under the Tort Claims Act for damages incurred in the course of performing his employment.

In *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485, this Court held that Army post-exchanges (which are nonappropriated fund instrumentalities) were "arms of the Government" and "integral parts of the War Department." This principle, that a non-appropriated fund activity is a federal instrumentality, has been held applicable in all of the cases which have involved such agencies, including one which concerned the naval food services involved in the case at bar. *Nimro* v. *Davis,* 204 F. 2d 734 (C.A.D.C.), certiorari denied, 346 U.S. 901. The logical corollary to these holdings is, of course, that an employee of one of these instrumentalities is a federal employee.

Following the decision in *Standard Oil* v. *Johnson, supra,* the Civil Service Commission concluded that the employees of these activities were subject to the laws and regulations administered by the Commission. The Department of Defense subsequently pointed to the administrative problems which would confront the military departments if these employees were not exempted from civil-service rules and regulations. See H.R. Rept. No. 1995, 82d Cong., 2d Sess., pp. 3–4. Because of these problems, Congress passed the Act of June 19, 1952, 66 Stat. 138, 5 U.S.C. (1952 ed.)

[2] This 1958 amendment does not apply to petitioner's 1951 injuries because it operates prospectively only.

150k (App., *infra*, p. 11), which provided that employees such as petitioner "shall not be held and considered as employees of the United States *for the purpose* of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act * * *"[3] (emphasis added). This statute emphasized the fact that since employees of nonappropriated fund instrumentalities were federal employees special legislation was needed to remove them from the coverage of the civil service laws and the Federal Employees Compensation Act. In the 1952 and 1958 Acts, the status of these activities as federal instrumentalities is expressly left unaffected. Thus, both the decided cases and the recent Congressional action leave no room for doubt that employees like petitioner have always been considered federal employees.

It is equally well established that employees of the United States, civilian as well as military, cannot maintain suits under the Tort Claims Act for damages incurred in the course of performing their duties. *Johansen* v. *United States*, 343 U.S. 427; *Feres* v. *United States*, 340 U.S. 135; *Lewis* v. *United States*, 190 F. 2d 22 (C.A.D.C.), certiorari denied, 342 U.S. 869. In *Johansen*, the Court held that, since the injuries of a civilian seaman were covered by the Federal Employees Compensation Act, suit would not

[3] The exemption of these employees from the Federal Employees Compensation Act and the insurance requirement in the 1952 statute represented a decision by Congress to place the financial burden of compensation insurance for such employees on the non-appropriated funds themselves, rather than upon the general public funds.

lie against the Government under the Public Vessels Act even though the Compensation Act did not at that time expressly provide that its benefits constituted the injured employee's exclusive remedy. The reasoning of the Court was not based on the exclusive character of the Compensation Act, as petitioner claims, but on the theory, fully applicable here, that one remedy must be fitted (343 U.S. 427, 432) "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." Similarly, in the *Feres* case, this Court, holding that a member of the armed forces could not maintain a suit under the Tort Claims Act for injuries sustained while in the performance of his duty, noted that Congress had provided a system (340 U.S. 135, 144) "of simple, certain and uniform compensation for injuries or death * * *."

Petitioner insists that the fact that Congress has consistently chosen to place the employees of non-appropriated fund agencies under private compensation acts indicates a Congressional purpose that they not be considered "federal employees" for injuries incurred in their employment and that they therefore be permitted to sue the United States as a third party tort-feasor. But petitioner does not suggest, as he cannot, why Congress should have wanted to give employees of non-appropriated fund activities greater rights against the Government than those possessed by other categories of federal employees. It is obviously because these agencies are permitted to use their own funds that Congress has decided to let them insure their own employees directly, rather than

through the broad general scheme for federal employees. This policy decision by Congress cannot, we submit, be construed as the grant of a right of suit under the Tort Claims Act to a particular category of federal employees, which, as this Court has held, is not available to federal employees in general. See also the *Aubrey* case, *supra*, p. 3.

In 1951, when petitioner was injured, it was the practice of the non-appropriated fund activities to provide the workmen's compensation that the 1952 Act later made mandatory. The Mare Island Cafeteria system did provide petitioner with such benefits and it is conceded that the California State Fund Insurance Company awarded him $4,085.76 for the injuries sustained by reason of his fall. Having received these compensation benefits from the Government, through its own instrumentality, petitioner, a federal employee, cannot, as the court below properly held, maintain this damage suit against the Government.

3. Petitioner urges, as a ground for certiorari, a "conflict among the circuits." Pet. 8. He then concedes that the two courts of appeals which have passed on the question are both against his position, and that only two earlier district court decisions have held an opposite view (*ibid.*). There is, accordingly, no such conflict between courts of appeals as would warrant review by this Court. Cf. Rule 19 of the Revised Rules of this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MORTON HOLLANDER,
MARK R. JOELSON,
Attorneys.

OCTOBER 1959.

APPENDIX

1. 28 U.S.C. 1346 (Federal Tort Claims Act) provides in pertinent part:

* * * * *

> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

2. The Act of June 19, 1952, 66 Stat. 138, 139, 5 U.S.C. (1952 ed.) 150k, 150k–1, provides (as it appears in the United States Code):

> § 150k. *Civilian employees not subject to laws administered by Civil Service Commission.*
>
> Civilian employees, compensated from nonappropriated funds, of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil

Service Commission or the provisions of the Federal Employees' Compensation Act, as amended: *Provided*, That the status of these nonappropriated fund activities as Federal instrumentalities shall not be affected.

The nonappropriated fund instrumentalities described in section 150k of this title shall provide their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment. In the case of employees employed in the continental United States (except Alaska), compensation shall be not less than that provided by the laws of the State (or the District of Columbia) in which the employing activity of any such instrumentality is located. In the case of employees employed outside the continental limits of the United States and in Alaska, compensation shall be not less than that provided in sections 907–909 of Title 33, except that in the case of such employees who are not citizens of the United States, compensation shall be in accordance with regulations to be prescribed by the Secretary of the Army, Navy, Air Force, or Treasury, as the case may be. This section shall take effect sixty days after June 19, 1952.

3. The Act of July 18, 1958, 72 Stat. 397, 5 U.S.C. 150k–1 provides (as it appears in the United States Code):

§ 150k–1. *Same; death or disability compensation; definitions; compensation districts; judicial proceedings; regulations; exclusiveness of remedy.*

(a) The Longshoremen's and Harbor Workers' Compensation Act shall apply with respect to the disability or death resulting from injury, as defined in section 902(2) of Title 33, of such Act, occurring to a civilian employee of any nonappropriated fund instrumentality de-

scribed in section 150k of this title, subject to the following provisions of this section:

(1) For the purposes of section 150k of this title and this section, the term "employee" in section 902(3) of Title 33 shall include only—

(A) those employees of such nonappropriated fund instrumentalities as are employed within the continental United States and

(B) those United States citizens or permanent residents of the United States or a Territory who are employees of such nonappropriated fund instrumentalities outside the continental limits of the United States.

(2) For the purposes of section 150k of this title and this section, the term "employer" in section 902(4) of Title 33 shall include each of the nonappropriated fund instrumentalities described in section 150k of this title.

(3) For the purposes of section 150k of this title and this section, only that part of section 903(a) of Title 33 which precedes the first comma shall apply.

(4) The Secretary of Labor is authorized—

(A) to extend compensation districts established under section 939(b) of Title 33 or to establish new districts to include the areas outside the continental limits of the United States and

(B) to assign to each such district one or more deputy commissioners as the Secretary deems advisable.

Judicial proceedings under sections 918 and 921 of Title 33 with respect to any injury or death occurring outside the continental limits of the United States shall be instituted in the district court within the

territorial jurisdiction of which is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such district.)

(b) In case of disability or death resulting from injury, as defined in section 902(2) of Title 33, of an employee who is not a citizen or permanent resident of the United States or a Territory, employed outside the continental limits of the United States by any nonappropriated fund instrumentality described in section 150k of this title, compensation shall be provided in accordance with regulations prescribed by the Secretary of the military department concerned and approved by the Secretary of Defense or regulations prescribed by the Secretary of the Treasury, as the case may be.

(c) The liability of the United States or of any nonappropriated fund instrumentality described in section 150k of this title, with respect to the disability or death resulting from injury, as defined in section 902(2) of Title 33, of any employee referred to in subsection (a) or (b) of this section, shall be determined as provided in section 150k of this title and this section. Such liability shall be exclusive and in the place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any person otherwise entitled to recover damages from the United States or such nonappropriated fund instrumentality on account of such disability or death in any direct judicial proceedings, in a civil action, or in admiralty, or by proceedings whether administrative or judicial, under any workmen's compensation law or under any Federal tort liability statute.

4. Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U.S.C. (1952 ed.) 905, provides (as it appears in the United States Code):

> § 905. *Exclusiveness of liability.*
>
> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

U.S. GOVERNMENT PRINTING OFFICE: 1959

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 10 1959
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 452

FERNANDO S. FORFARI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI.

GEORGE OLSHAUSEN,
1238 Pacific Avenue,
San Francisco 9, California,
Attorney for Petitioner.

ERNEST E. EMMONS, JR.,
THOMAS A. MULVIHILL,
1095 Market Street,
San Francisco 3, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No.

FERNANDO S. FORFARI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI.

Respondent's brief in opposition largely begs the question; and, in its last paragraph, inaccurately applies Rule 19 of this Court.

1. On page 4 respondent says: "The issue has been stripped of all prospective importance by recent legislative action." This is a stock argument in opposition to petitions for certiorari; in this case it is directly contrary to the facts.

As pointed out in our petition, the 1958 legislation put employees of non-appropriated agencies under the Longshoremen's and Harborworkers' Compensation Act; this act establishes the same basic system with exactly the same problems as existed when Forfari was injured. The question under the Longshoremen's

Compensation Act, as it was under the California compensation act, is whether placing these employees under an act insuring private employers and allowing third party tort feasor suits, indicates an intention *not* to treat them as employees of the United States, and consequently permitting them to sue the United States as third party tort feasor in a proper case.

2. So it is a non sequitur when respondent says at pages 5-6 "Thus, there can be no doubt that, under present law, employees such as petitioner are granted a compensation remedy under the Longshoremen's and Harbor Workers' Compensation Act and that, by virtue of the express exclusivity provision in the 1958 amendment of 5 U.S.C. 150k-1, no *additional* remedy may be sought against the United States under the Tort Claims Act."

Both the Longshoremen's and Harborworkers' Act and the California Act provide for third party tort feasor's suits; so such a suit is *not an additional* remedy.

3. Likewise at the foot of page 7 respondent says:

> "In *Johansen*, the Court held that, since the injuries of a civilian seaman were covered by the Federal Employees Compensation Act suit would not lie against the Government under the Public Vessels Act . . ."

But Forfari was not under the Federal Employees Compensation Act, nor are non-appropriated employees at the present time under that act. The question of the case is, whether the operation of the applicable private compensation acts is the same or different from that of the Federal Employees' Compen-

sation Act. Respondent's quotation simply begs that question.

4. Respondent again begs the question and completely loses its way when it says at page 8:

> "But petitioner does not suggest, as he cannot, why Congress should have wanted to give employees of non-appropriated fund agencies *greater rights against the Government* than those possessed by other categories of Federal Employees." (Italics added.)

This assumes the question at issue—whether the system of compensation made applicable to these employees indicates an intention that they shall not be employees of the United States from the standpoint of on-the-job injuries.

As a corollary, it is a misconception to talk about "greater rights". The third party tort feasor suit runs against some one *other than the employer*. If the United States is the employer, the right runs against *any one else*. If the United States is *not* the employer, the right may run against the United States.

To say that there is a "greater" right against the Government, is to assume that the Government is the employer, and that there are two remedies *against the employer*. As we have shown, this assumes the very question of the case.

5. Respondent says at page 4:

> "These agencies are permitted to employ the funds which their activities produce rather than covering (sic) them into the Treasury and then withdrawing them by appropriation."

and then on page 9:

> "Having received these compensation benefits *from the Government,* through its own instrumentality petitioner, a federal employee, cannot . . . maintain this damage suit against the Government" (Italics added.)

But what respondent here says of the non-appropriated agencies *is true of all private enterprise.* Private corporations pay some taxes, but otherwise "are permitted to employ the funds which their activities produce rather than covering (sic) them into the treasury and then withdrawing them by appropriation". But a payment by a private corporation out of funds which "its activities produce" and which it is "permitted to employ"—*is not considered to be a payment by the Government.*

So a payment out of the profits of the non-appropriated agencies *is not a payment by the government.* This much was held even by *Aubrey v. U. S.*, 254 F. 2d 768, 771—quoted at page 14 of our petition:

> "The cost of such protection would be paid out of the proceeds of these self-supporting activities and *not out of public funds.*" (Italics added.)

The difference between the non-appropriated agencies and private business is that of control. This was held decisive in *Standard Oil Co. v. Johnson*, 316 U.S. 481, where there was no legislative (or other federal) expression to the contrary.

Placing non-appropriated employees under private compensation acts, however, puts the emphasis not on control but on the source of funds. This is indicated

by the very language of the government's brief in opposition (pp. 4, 9, quoted above) and of *Aubrey v. U. S.*, 254 F. 2d 768, 771, quoted above.

By making source of funds the test, and by withdrawing these employees from the Federal Employees' Compensation Act, an intention is manifested to assimilate them with private business rather than with the government. Under these circumstances they can sue the United States as a third party tort feasor on appropriate facts.

6. In its last paragraph on page 9, respondent says, that since the decisions in the Second and Seventh Circuits are by District Courts, "There is accordingly, no such conflict between the courts of appeals as would warrant review by this court."

Rule 19 is cited. This clearly does not follow. Rule 19 explicitly provides:

> "The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered."

7. The petition should be granted as prayed for.

Dated, San Francisco, California,
November 5, 1959.

Respectfully submitted,

GEORGE OLSHAUSEN,
Attorney for Petitioner.

ERNEST E. EMMONS, JR.,
THOMAS A. MULVIHILL,
Of Counsel.